Petition

81-1434

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM A. FRANK,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

POWERS McGUIRE
40 Brink Street
Crystal Lake, Illinois 60014
(815) 455-0244
Counsel for Petitioner

Of Counsel:
RICHARD C. KELLY
40 Brink Street
Crystal Lake, Illinois 60014
(815) 455-0244

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether the admission of certain physical evidence, to wit: a pistol with silencer, in contravention of the Fourth Amendment constituted such error as would require a reviewing court to reverse a criminal defendant's conviction for murder and aggravated kidnapping under Illinois law.

2. Whether a prosecutor's questioning of a defendant on cross-examination, contrary to a Trial Court's Order in limine and in violation of the defendant's right to remain silent while being questioned by the police was such error as would require a reviewing court to reverse a criminal defendant's conviction for murder and aggravated kidnapping under Illinois law.

3. Whether the prosecutor's failure to notify the defense of the State's intention to call a co-defendant as witness until after the prosecution was about to rest its case constitutes a denial of due process.

4. Whether a substantially disparate sentence from co-defendants equally situated and who equally participated in the same crime is a denial of due process.

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, Second Judicial District, entered in this cause on the first day of January, 1981, affirming a judgment of conviction of the defendant for offenses of murder and aggravated kidnapping.

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In The

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WILLIAM A. FRANK,

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second District, is reported in *People v. Frank*, 98 Ill. App. 3d 388, 424 N.E. 2d 799 (1981).

JURISDICTION

The final judgment of the Appellate Court of Illinois, Second District, was entered on August 27, 1981, and an Order of Denial of Petition for Leave to Appeal said judgment to the Illinois Supreme Court was entered on November 30, 1981, a mandate being issued thereon on December 28, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), in that defendant asserts that his rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution were violated by the State Court.

STATUTES INVOLVED

Section 1005-8-1(a)(i)(a) of Chapter 38, *Illinois Revised Statutes*, provides in pertinent part as follows:

> (a) A sentence of imprisonment for a felony shall be a determinate sentence set by the Court under this Section, according to the following limitations:
>
> (1) for murder, (a) a term shall be not less than 20 years and not more than 40 years
>
> . . .

Section 1005-8-2 of Chapter 38, *Illinois Revised Statutes*, provides in pertinent part as follows:

> (a) A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the factors set forth in paragraph (b) of Section 5-503, were found to be present. Where the judge finds that such factors were present, he may sentence an offender to the following:

(1) for murder, a term shall not be less than 40 years and not more than 80 years;

Section 412 of Chapter 110(a), *Illinois Revised Statutes*, Supreme Court Rule 412, provides in pertinent

(2) When a defendant is convicted of any felony and the court finds that the offense was accompanied by exceptional brutal or heinous behavior indicative of wanton cruelty.

Section 412 of Chapter 110(a), *Illinois Revised Statutes*, Supreme Court Rule 412, provides in pertinent part as follows:

> Disclosure to Accused (a) except as otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control: (i) the names and last known addresses of persons whom the State intends to call as witnesses, together with a relevant written or recorded statement, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statement.

STATEMENT OF THE CASE

The defendant was convicted in a State Trial Court under Illinois law of the offenses of murder and aggravated kidnapping. A pretrial motion to suppress evidence was conducted on January 8, 1980 and was denied by the Court on that date. At the hearing on the Motion to Suppress Physical Evidence, police officers from Lake and McHenry Counties in Illinois testified. An

arrest of the defendant was made by Lake County officers after a surveillance of the defendant and a companion was conducted at the request of McHenry County Officers (Tr. 132). Officer Kurt Proschivitz of the Lake County Sheriff's Police kept the defendant and companion under surveillance for two hours while the defendant was in a gas station (Tr. 147). As the defendant left the gas station in an automobile, the automobile was stopped by several marked units of the Lake County Sheriff's Department and the defendant was placed under arrest for driving on a suspended Illinois driver's license. The defendant's motor vehicle was searched as was the trunk of the motor vehicle and no contraband or other evidence was seized. The defendant was actually charged with driving on a suspended license and improper registration of vehicle. The defendant was transported to the Lake County Sheriff's Department where his bond was set by Supreme Court Rule at $100.00. While in custody at the Lake County Sheriff's Department, Officers Macheroux and Hendle of the McHenry County Sheriff's Department questioned the defendant concerning a homicide of one Edward Caraher. They asked the defendant if he owned a gun and the defendant agreed to surrender to them a .22 caliber Luger which was on the premises of his uncle, known as Frank's Lounge. The defendant, accompanied by the detectives from the McHenry County Sheriff's Department, went to his uncle's home, procured a key for entry into the premises and accompanied the officers to Frank's Lounge, North Chicago, Illinois. The defendant and the two officers entered the premises for the purposes of procuring the .22 caliber Luger pistol that the defendant admitted he owned. While on the premises the defendant went behind the counter and moved a green attache case approximately "18 inches". At that time Officer Hendle picked up the case from the counter, unzipped and unlatched it and found a gun with a silencer. The

gun, with the silencer, was seized by the officers and was introduced into evidence at the defendant's trial along with testimony of witnesses that he had manufactured this weapon. After the gun with the silencer was seized, the defendant immediately went to another part of the premises and procured a .22 caliber Luger pistol and turned it over to the arresting officers. The defendant concedes that the Luger pistol was given to the arresting officers with his consent.

The principal witness for the State was the co-defendant, Edward Wieting, who had entered a plea of guilty on the 16th of May, 1980, and who testified for the State on January 23 of 1980 after being writted from the Illinois State Penitentiary by a Writ of Habeas Corpus Ad Testificandum five days after the commencement of the defendant's trial. Mr. Wieting was not listed as a State's witness in writing, nor was any notice given to the defense of the State's intention to call him as a witness until immediately before the State had rested its case. Wieting and his attorney had represented to the defendant's attorney that he would not testify under any circumstances (Tr. 816). Wieting had been sentenced by the same judge in the Trial Court to a term of 30 years in the Illinois State Penitentiary and there was no agreement with the State that he be called as a witness against the defendant.

Prior to trial, the defendant made a Motion to Suppress statements made after his arrest. The Trial Court found that these statements were given after promises of leniency and were involuntary. Thereafter the defense made a motion in limine to prohibit the State from questioning the defendant about any post-arrest statements that the defendant may have made. The Trial Court entered an Order prohibiting the State's Attorney from in any way offering evidence or alluding to any post-arrest statements. The State began the cross-examina-

tion of the defendant by asking in its third and fourth questions:

> Assistant State's Attorney:
> Question: When was the first time you told anybody the story about having shot Eddie Caraher by accident?
> Answer: I believe it was either J.J. and Finney.
> Question: The night you were arrested, did you tell the police you shot him by accident.
> Objection (Tr. 895).

The Trial Court, sustaining the defendant's objection to the above, commented as follows: "I am still almost in the state of shock that you asked the last question as you did, very frankly, when the State full well knows the only thing that was said to the police, other than the denial of knowing anything has been suppressed, can not be used under *Harris*, (and further) there is no such thing as admissions by silence. The only other statements that I know of that were made, there has been a stipulation by the State that they weren't going to use them." (Tr. 897). The Assistant State's Attorney stated: "And again I apologize. If the Court wants to sanction me in any way" (Tr. 897), the Court "It is not a question . . . we are putting in jeopardy a long trial." (Tr. 898).

The jury returned a verdict of guilty on charges of murder and aggravated kidnapping and found the defendant not guilty of a charge of armed robbery under Illinois law. The sentence hearing was conducted and the Trial Court sentenced the defendant to 75 years in the Illinois Department of Corrections, applying the extended term provision of the Illinois Unified Code of Corrections and finding that the crime was exceptionally brutal and heinous.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with decisions of this Court as to what amounts to reversible error in a criminal proceedings. In applying the Doctrine of Plain View that is enunciated in *People v. Bambiciano*, 51 Ill. 2d 17 (1972), it justified a search of a closed attache case where the police are on premises, only for the purpose of procuring a weapon that the defendant was to voluntarily turn over to him after his arrest completely disregarding this Court's holding in *United States v. Chadwick*, 433 U.S. 1 (1977). "In sum a person's expectations of privacy in personal luggage are substantially greater than in an automobile". In the instant case, the officers were both armed, the defendant had been arrested and under arrest for a considerable period of time and had been searched. The officers had no reason under the circumstances to fear for their safety nor did they state same during the Motion to Suppress.

Furthermore, the decision below erred in holding that the prosecutor's cross-examination of the defendant about a post-arrest statement that was suppressed on the grounds of being involuntary was harmless error. The Appellate Court of Illinois decision ignores this Court's decisions in *Chapman v. California*, 386 U.S. 18 (1967) and *Fahey v. Connecticut*, 375 U.S. 85 (1963).

Furthermore, the decision below also erred in holding that the defendant was not deprived of due process of law by allowing the State to call Edward Wieting as a witness without having indicated to the defense that it intended to call Wieting. The Appellate Court of Illinois ignores this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1962) and *Berger v. United States*, 295 U.S. 78 (1934).

Finally, the Court below erred in sentencing the defendant to a term of 75 years in the Illinois Department of Corrections while co-defendants, who pled guilty and equally participated in the commission of the offense, were sentenced to terms of 30 years and 35 years respectively.

I.

IN HOLDING THAT THE CIRCUMSTANCES UNDER WHICH THE POLICE SEIZED A GUN WITH THE SILENCER DID NOT AMOUNT TO AN UNREASONABLE SEIZURE, THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

A search and seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of the carefully defined sets of exceptions based on the presence of "Exigent Circumstances".

Coolidge v. New Hampshire, 403 U.S. 443 at 474-475 (1971).

Assuming a valid consent, the police may not exceed the physical bounds of the area as to which the consent was granted, such as looking through private papers after a consent to allow search for narcotics.

U.S. v. Dichiarinte, 445 F. 2d 126 (7th Cir. 1971).

The decision below recognizes there are Illinois cases holding that a consent to search is limited to the area or objects specified in the consent and the search may not go beyond the extent of that consent.

People v. Schmoll, 383 Ill. 280 (1943),
People v. Sanders, 44 Ill. App. 3d 510 (1976).

The Court below does not justify the search on the basis of consent, but merely attempts to justify the search on the Doctrine of Plain View. It ignores the decision of this Court in *U.S. v. Chadwick*, 433 U.S. 1

(1977). "In sum a person's expectations of privacy in personal luggage are substantially greater than in an automobile." There is no testimony that a gun or any contraband was in plain view at the time of the seizure of the fully zippered closed attache case by the police officer.

II.

IN HOLDING THAT THE STATE'S QUESTIONING OF THE DEFENDANT ON CROSS-EXAMINATION "THAT THE NIGHT YOU WERE ARRESTED DID YOU TELL THE POLICE YOU SHOT HIM BY ACCIDENT" WAS HARMLESS ERROR, THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND COURTS OF APPEAL.

It is well settled that before a federal constitutional error can be held to be harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Chapman v. California, 386 U.S. 18 (1967).

Thus the question becomes whether there is a reasonable possibility that the error complained of might have contributed to the conviction.

Fahey v. Connecticut, 375 U.S. 85 (1963)

In making this determination, it is immaterial that there is sufficient evidence which would have convicted the petitioner without the evidence complained of.

Fahey v. Connecticut, supra.

In *United States, ex rel. Alan v. Rowe*, 591 F. 2d 391 (7th Cir., 1979), the Court of Appeals following this Court's decision in *Doyle v. Ohio*, 426 U.S. 610 (1976) held where a prosecutor asked questions concerning the defendant's failure to give information to police officers concerning the defendant's fears, which were objected to, sustained and the jury admonished, was not harmless

error. Likewise in the instant case where a prosecutor begins cross-examination of the defendant by asking about a statement that has been suppressed and rendered involuntary, this was not harmless error and violative of the defendant's right to remain silent.

III.

IN HOLDING THAT A FAILURE OF THE STATE TO NOTIFY THE DEFENSE THAT THEY INTENDED TO CALL A CO-DEFENDANT, WHO HAD ALREADY PLED GUILTY AND WAS IN THE PENITENTIARY, AS A WITNESS UNTIL THE STATE HAD ALL BUT RESTED ITS CASE, DID NOT AMOUNT TO SUCH A DEPRIVATION OF DUE PROCESS BY THE STATE AS TO MERIT A NEW TRIAL, THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The suppression by the prosecution of evidence favorable to accused upon request violates due process, where the evidence is material either to the guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady v. Maryland, 373 U.S. 83 (1962).

To withhold the intent to call a co-defendant as a witness until the State has all but rested their case, is a violation of due process under the provisions of *Brady*. To put a quantity on due process, is to misconstrue the meaning of the Fourteenth Amendment. Illinois Supreme Court Rule 412 provides in sub-section (a)(i) that the State disclose the names and last known addresses of persons whom the State intends to call as witnesses. This Rule goes on to provide in sub-section (d),

> "The State shall perform its obligations under this Rule as soon as practicable following the filing of motion by defense counsel."

In the instant case, the petitioner was not given notice of the State's intent to call the co-defendant as a witness

until after the entire State's case had been put in with the exception of that witness. Both counsel representing the co-defendant, Wieting, represented to the petitioner-defendant's trial counsel that Wieting could not be called as a witness and that the State agreed as part of the negotiated plea not to call him as a witness. In addition, the day before the co-defendant appeared as a witness, the Trial Court issued a Writ of Habeas Corpus Ad Testificandum directed to the Illinois State Penitentiary where the co-defendant had been sentenced and did not notify the defense of its issuance until the next day. The government prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation is to govern all: and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done, *Berger v. United States*, 295 U.S. 78 (1934).

The Appellate Court of Illinois in holding that this was not such a deprivation of due process to merit a new trial, inferentially holds that this was a violation of due process.

IV.

IN UPHOLDING THE PETITIONER'S SENTENCE OF 75 YEARS TO THE ILLINOIS DEPARTMENT OF CORRECTIONS WHILE CO-DEFENDANTS WHO EQUALLY PARTICIPATED IN THE COMMISSION OF THE SAME OFFENSE AND WERE EQUALLY SITUATED, RECEIVED SENTENCES OF 30 YEARS AND 35 YEARS RESPECTIVELY BY THE SAME TRIAL JUDGE, THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

Section 1005-8-2(a)(1) of Chapter 38, *Illinois Revised Statutes*, provides that a judge shall not sentence an offender to an extended term unless the judge finds that the offense was accompanied by exceptionally brutal or heinous behavior, indicative of wanton cruelty. After a

trial by jury, the Court found that such factors in aggravation were present, and sentenced the defendant to 75 years. Subsequently he sentenced a co-defendant who equally participated in the commission of the offense to 35 years without finding the same aggravating factor present. Likewise, prior to the defendant's trial, another co-defendant was sentenced to 30 years without finding the factors in aggravation present. This Court has held where original conviction has been set aside because of constitutional error, any imposition of heavier sentence that could penalize the convicted person who chooses to exercise constitutional rights would be unconstitutional under the due process clause of the Fourteenth Amendment, *North Carolina v. Pearce*, 395 U.S. 711 (1969).

Likewise this Court has held that under our constitutional system, it is impermissible for a sentencing authority to mete out higher sentences on retrial as punishments for those who successfully exercise their right to appeal or to attack collaterally their conviction, and fundamental notions of fairness embodied in the concept of due process require that a convicted defendant be free of an apprehension of such retaliatory motivation, *Chaffin v. Stynchcombe*, 412 U.S. 17 (1977). Equality is the mother of justice, an Alexandrian metaphor. Given that adherence to disparate sentences is unjust and a denial of due process, one can only conclude that the sentence given to the petitioner as being substantially disparate is unjust and attempt by the Court to penalize the defendant for exercising his right to trial by jury. The Illinois Courts of Review have recognized that in the interest of fundamental fairness, the Courts have always attempted to obtain even handed justice by avoiding disparity of sentences particularly for participation in the same crime, *People v. Malden*, 57 Ill. App. 3d 107 (1978); *People v. Sherman*, 52 Ill. App. 3d 857 (1977).

In *People v. Kline*, 99 Ill. App. 3d 540 (1981), the Illinois Appellate Court for the Third District remanded the defendant's sentence of 50 to 100 years for resentencing as two co-defendants equally situated received lesser sentences. The Court held "Fundamental fairness and respect for the law, require that defendants similarly situated may not receive grossly disparate sentences." And further, "The issue is one of equal justice under the law, a legend which is carved in stone at the entrance to the United States Supreme Court Building. The equal justice concept refers to a constitutional right which all persons have, and which does not permit us as judges of the Court of Review, or a trial judge, to disregard this principle." The Trial Court's application of the heinous crime sentencing provision to one defnedant while not applying it to other defendants who equally participated in the same offense was a denial of due process of law and could have only resulted from an attempt by the Trial Court to increase the punishment against the defendant for exercising his constitutional right to trial by jury.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

POWERS McGUIRE
40 Brink Street
Crystal Lake, Illinois 60014
(815) 455-0244
Counsel for Petitioner

Of Counsel:
RICHARD C. KELLY
40 Brink Street
Crystal Lake, Illinois 60014
(815) 455-0244

Appendix

APPENDIX A

Opinion of the Appellate Court

No. 80-187 Filed July 23, 1981

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

WILLIAM A. FRANK,
Defendant-Appellant.

Appeal from the Circuit Court
of the 19th Judicial Circuit,
McHenry County, Illinois.

MR. JUSTICE UNVERZAGT delivered the opinion of the court:

Defendant, William A. Frank, was convicted of murder and aggravated kidnapping and sentenced in the circuit court of McHenry County to concurrent terms in the penitentiary of 75 years for murder and 30 years for aggravated kidnapping.

In this appeal the defendant raises the following issues:

(1) Whether the trial court erred in denying defendant's motion to suppress certain physical evidence;

(2) Whether the trial court erred in not directing a finding in favor of the defendant at the close of all the evidence on the ground that the State failed to establish the proper venue of the crime as being in McHenry County where he was tried and convicted;

(3) Whether the trial court erred in allowing the State to call without proper notice a co-defendant, thus depriving the defendant of due process of law;

(4) Whether the trial court erred in denying defendant's motion for mistrial because of improper cross-examination of the defendant in violation of a motion *in limine* granted prior to trial;

(5) Whether the trial court erred in not giving the jury an instruction on involuntary manslaughter and,

(6) Whether the defendant's sentence was excessive in view of the disparate sentences for his co-defendants.

The defendant, his two co-defendants, Edward Wieting and Clif Johnson, and the victim, Edward Caraher, all worked at International Minerals and Chemical Corporation in Libertyville, Illinois. In January of 1979, this plant was in the process of being dismantled because of the company moving to another location and there were relatively few employees working at the plant at that time. The defendant kept a gun at the plant and had another gun with a silencer attached which he kept with him at various times. There was some testimony to the effect that the victim and the defendant had quarreled not long before the day of the murder.

On January 22, 1979, the victim, the defendant and two co-defendants, Wieting and Johnson, were at the International Minerals' plant. The defendant and the

victim carried a desk out of the plant and put it in Johnson's van. As Caraher started to leave the van Wieting, armed with a pistol owned by the defendant, ordered Caraher to remain in the van saying they "wanted to talk to him." Caraher laughed and started to flee, whereupon Wieting shot at Caraher and wounded him in the knee. The defendant then wrestled Caraher to the ground and shot him in the other leg. Caraher still continued to struggle, whereupon Wieting struck him on the head with the pistol. There was also evidence of a knife wound in one leg and considerable bleeding therefrom. After subduing Caraher, they took him back to the van, handcuffed him and administered chloroform to him to keep him quiet. The three of them then drove around looking for some place to dump Caraher. At this time, Caraher was still alive, although unconscious. They went to a tavern and talked about what they would do with Caraher. Johnson then went outside and when he returned he said that he had killed Caraher by giving him chloroform. When they left the tavern, Wieting believed Caraher was still unconscious rather than dead as his leg was still bleeding. They returned to the plant where they took Caraher's car and drove it to Gurnee, where they removed the license and a tool box and threw away the keys. They then drove into McHenry County where, on a deserted road, they dumped Caraher's body out into a snow bank. His body was found the next day by a McHenry County road crew.

McHenry County Police immediately began an investigation of Caraher's death. They learned that Frank, Johnson and Wieting were friends and all worked at International Minerals, where Caraher had worked. They also learned that Frank and Caraher had quarreled at some previous time and that Frank, Wieting and Johnson had been seen together at a tavern the

night before the body was found. However, Lt. Hendle of the McHenry County police testified he was not looking specifically for the defendant at that time but was looking for the victim's car. On January 30, Lt. Hendle and another McHenry County police officer observed Frank's car. They followed it to a gas station and after the car left the gas station, Lake County police, who had been alerted by Hendle, stopped the car and arrested Frank and Wieting. Previous to this, McHenry County police had been aware that Frank was driving on a suspended license and his car was not properly registered. There was also open liquor in the car which they were aware of as they had observed Frank and Wieting drinking liquor in the car. Frank and Wieting were taken to the McHenry County Jail where Frank was charged with driving on a suspended license. He was not charged with murder at that time. He was given *Miranda* warnings and during the questioning he was asked if he had shot a gun at the plant. He replied that he had and agreed to show the officer the gun in question which he said was at a tavern in North Chicago. The police procured a key to the tavern and went there. At this time the officer knew from other employees at the plant that Frank had a gun with a silencer attached which he carried in a green zippered case. The police had no information about a second gun. It was testified, however, that the defendant had agreed to give the police the gun he had shot at the plant. Arriving at the tavern in North Chicago, the defendant reached under the bar and began searching for something. According to Hendle he moved a green zippered case which was on a shelf below and appeared to shove it toward Hendle. Hendle then took the case, opened it and found the gun with the silencer inside the case. Frank also at that time procured a Luger pistol from another location in the tavern and handed it to Hendle. While they were at the

tavern, the police were informed by Frank that he had shot the gun in the basement of the tavern and they searched the basement and found some spent bullets and casings. The spent shells and casings taken from the basement were found to match a bullet in the leg of Caraher. However, the defendant had drilled out the barrel of the silencer so that no ballistic determination could be made as to the gun from which the bullet found in Caraher's leg had been fired.

While at the police station on January 30, the defendant made a statement to the police. He was not, however, charged with murder or held at that time. He was given a receipt for his guns and was released.

In the interval between January 30 and September 12, 1979, the police learned more about the details of Caraher's death from persons to whom the defendant and his co-defendants had talked. On September 12, 1979, the defendant was arrested and charged with Caraher's murder. Wieting and Johnson were also arrested and gave inculpatory statements. Prior to the defendant's trial, Wieting and Johnson negotiated guilty pleas and were sentenced to 30 and 35 years in the penitentiary respectively.

While in custody in September of 1979, the defendant also gave an inculpatory statement after he had been interviewed by the State's Attorney who had stated to him that if the defendant would "cooperate" and give a statement he, the State's Attorney, would not ask for the death penalty, otherwise he would seek the death penalty, reciting to the defendant some of the unpleasant effects of being electrocuted. Defense counsel made a motion to suppress defendant's confession on the ground that it was obtained by coercion and promises of leniency and after argument, this motion was granted by the trial court. The defense also made a motion *in*

limine to preclude references to statements made by the defendant in his interview with the police following his arrest on January 30. This motion was also granted. At the trial, the prosecution, in cross-examination of the defendant, referred to defendant's interview with the police on January 30 and inquired if the defendant had ever at that time claimed that he shot the victim by accident. Objection to this was sustained and defense counsel in chambers made a motion for a mistrial. The trial court, after admonishing the prosecutor, denied the motion for a mistrial. The trial then proceeded and the defendant was convicted and sentenced.

Prior to the trial, the defendant made a motion to suppress the physical evidence—the two guns taken from Frank at the time of his first arrest in January of 1979. Defense counsel argued that the search and seizure of the pistol with the silencer was illegal because the defendant had only voluntarily given consent to the police to search for a Luger pistol which they had learned about in the initial arrest—this was the gun the defendant referred to when he offered to take the police to the place where he kept the gun and show it to them. The police, however, had been informed by persons at the IMC plant who had seen it, that Frank had another gun with a silencer attached which he carried in a green zippered case. Upon arriving at the tavern where the Luger was kept, Lt. Hendle noticed a green zippered case on a shelf below the bar which the defendant, whether intentionally or not, called Hendle's attention to by shoving it along the shelf. Hendle then took the case, unzippered it and found the pistol with the silencer inside. The other gun was voluntarily handed over at the tavern. The trial court denied the motion to suppress the pistol with the silencer and both guns were admitted in evidence.

We do not regard the court's denial of the motion to suppress the pistol with the silencer as evidence as amounting to reversible error, as contended by the defendant. The defendant had voluntarily brought the police to the tavern, where he kept the two guns. The police had already been informed that the defendant kept a gun in a green zippered case, which he sometimes carried with him, and they were searching for guns at the time they were at the tavern, in accordance with the defendant's consent. We think it was not reasonable to expect the officers to disregard the green case, similar to the one previously described by one of defendant's co-workers, which was reported to contain a gun and which was not only in plain view on a shelf in the tavern but attention to which was called by the defendant himself pushing it along the shelf. Hendle would not reasonably have known at that time that the gun inside the case was not the Luger referred to in defendant's offer to show the police the gun he had referred to at the time of his arrest as being the one he had shot at the plant. In any event, we think it was not beyond the reasonable limits of the consent for Lt. Hendle to have unzipped the case which he had reason to suppose contained a gun owned by the defendant and who at that time was a logical suspect.

We are aware of those cases holding that a consent to a search is limited to the area or objects specified in the consent and the search may not go beyond the extent of that consent. In *People v. Schmoll* (1943), 383 Ill. 280, cited by the defendant, the defendant in that case consented to the search and seizure of one medical file. However, the police searched generally and seized all the defendant's medical files. Our supreme court held that this search and seizure was beyond the scope of the consent. In *People v. Sanders* (1976), 44 Ill. App. 3d 510,

513, the consent to "look into" the defendant's automobile trunk was held to have been exceeded by a minute search of the trunk, which uncovered a paper bag which the defendant attempted to stop the officers from examining but which the officers refused to yield up and which was found to contain marijuana.

However, in the case before us the consent was not so clearly limited as in *Schmoll* and *Sanders*, since no consent to a search was requested and the fact of the defendant offering to take the police to the tavern to see the weapon they had asked him about was a mere offer to co-operate with the police. It is possible to argue that Lt. Hendle exceeded the defendant's intention when he examined the zippered green case but we think that was a reasonable consequence of the defendant's invitation to the police to be present and examine the gun at the tavern premises, inasmuch as the case containing the gun was clearly visible and no restrictions were indicated by the defendant. The case here is more nearly akin to the circumstances in *People v. Bombacino* (1972), 51 Ill. 2d 17. There the lethal weapon — a baseball bat — was observed by the police officer through the open window of an automobile which the officer had been informed belonged to the defendant and which was standing in the driveway of one of the defendant's companions. One end of the bat appeared to have blood on it and the police officer reached into the automobile and removed the bat. The supreme court upheld the trial court's denial of a motion to suppress the bat as evidence, saying that the taking of the bat under the circumstances did not constitute an unreasonable seizure. In the case before us the defendant volunteered to lead the police to a place where he kept the gun he had fired at the plant without disclosing that he had a second gun at the same place. The police officer being legally on the premises

observed the case which had previously been mentioned as containing a gun. After the officer had opened the case which contained the silencer gun, the defendant said that that was not the gun he had shot at the plant, whereupon the defendant went to another place and returned with the gun (a Luger) which was the gun he had discharged at the plant. We think these circumstances do not amount to an unreasonable seizure of the pistol with the silencer.

The defendant also raises a question as to the venue of the crime. He contends that it was not proved beyond a reasonable doubt that Caraher was killed in McHenry County, where his body was found and where the defendant was tried for murder. The only definite evidence as to the cause of the victim's death was given by Dr. Robert Stein, pathologist and chief medical examiner for Cook County. He expressed the opinion that the cause of death was exposure from being dumped into the snow bank and left there over a period of time during very low temperatures. This occurred in McHenry County. While Dr. Stein thought that the wounds inflicted to the victim by gun and knife were contributing factors, he believed the condition of the body when found was consistent with death from exposure. While Clif Johnson indicated that he believed he may have killed the victim by administering a large dose of chloroform to him in the parking lot of the Conqueror I in Lake County, there was no medical evidence establishing the cause of death as being an overdose of chloroform. Death from chloroform was a possibility but it was not established as a fact nor was the exact time of death known. The best available evidence was the opinion of Dr. Stein that Caraher died from exposure.

Moreover, wherever it occurred, Caraher's death had a number of contributing factors, the wounds inflicted

by gun and knife, the chloroform and the exposure. Section 1-6(f) of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 1-6(f)) provides that:

> "If an offense is committed upon any railroad car, vehicle, * * * passing within this State, and it cannot readily be determined in which county the offense was committed, the offender may be tried in any county through which such railroad car, vehicle, * * * has passed."

Thus, if Caraher died in the van from a combination of injuries inflicted on him by the defendant and his companions, venue would properly be in McHenry County as being the county through which the van had passed. This point of appeal is therefore rejected.

The defendant says he was deprived of due process of law by the State calling Edward Wieting as a witness without having indicated to the defense discovery motion that it intended to call Wieting. Defense counsel claims to have been taken by surprise. However, it is clear from the testimony that defense counsel relied on assurances from another lawyer — Wieting's defense counsel — that Wieting would not agree to testify and would not be called by the State. This assurance would not, of course, bind the State. It is obvious that the State did not originally intend to call Wieting as he was a co-defendant. However, Wieting pleaded guilty on January 16, a week before the defendant's trial, and was immediately taken away to the penitentiary. While there he agreed to testify. His name appeared on the list of possible State witnesses prepared for the jury and was read to the jury on the morning that jury selection for defendant's trial began. Defense counsel claimed surprise because he had relied on assurances from Wieting's lawyer that Wieting would not testify. He objected to Wieting as a witness due to the inadequate notice and

the court gave defense counsel an opportunity to interview Wieting before he testified, which counsel did. Defense counsel did not ask for a continuance based on surprise or for time needed to reorganize his defense, but announced he was ready for trial and the trial proceeded. We do not think these circumstances amounted to such a deprivation of due process by the State to merit a new trial.

As a further basis for a new trial, the defendant raises the contention that the trial court erred in denying his motion for a mistrial when the prosecutor asked a question on cross-examination which violated the pretrial ruling granting a motion *in limine* to preclude reference to statements made by the defendant at the time of his arrest on January 30. The defendant had testified that his shooting of the victim was accidental and the prosecutor then asked if he had told the police it was an accident during his questioning on January 30. The question was immediately objected to and was not answered by the defendant. The trial court sustained the objection and reprimanded the prosecutor; however, the trial court refused to grant defense counsel's motion for a mistrial, saying that it did not consider that the prejudice to the defendant had been so severe as to merit declaring a mistrial. Whether the defendant's motion for a mistrial was based on a plain violation of the order *in limine* not to refer to statements made by the defendant to the police on January 30, or on the principle that the defendant cannot be impeached by a showing of his post-arrest silence when he was interrogated by the police, is not entirely clear from the record. The defendant's brief refers to the principles set out by the United States Supreme Court in *Doyle v. Ohio* (1976), 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240, where the court held that the prosecutor's cross-examination of the defendant as to his failure to inform arresting police officers

of circumstances indicating an attempt to frame him violated the defendant's right to remain silent after being given *Miranda* warnings. In *People v. Rush* (1978), 65 Ill. App. 3d 596, the court, following *Doyle*, also held such questioning about post-arrest silence to be improper but determined it was harmless error in that case in view of the overwhelming evidence otherwise against the defendant.

In the case before us, the impact of the improper questioning was much less severe than in *Doyle* and *Rush* — only one question was asked and it was not answered, objection was sustained and the trial court instructed the jury to disregard the question and that line of questioning was not pursued. The effect on the trial as a whole was therefore minimal and whether properly regarded as a violation of the right to remain silent after arrest as in *Doyle*, or whether the objection to the question was founded on a violation of the order *in limine* not to refer to statements made following the January 30 arrest, we think the error was harmless. In view of the other overwhelming evidence of the defendant's guilt, we do not feel one improper question had an impact grave enough to require a new trial.

It is the defendant's contention that the trial judge erred in not giving a requested instruction on involuntary manslaughter. It is, of course, the general rule that it is reversible error for the trial court to refuse to give a manslaughter instruction in a murder trial if there is evidence which would permit a finding by the jury of guilty of manslaughter, rather than murder. (See *People v. Canada* (1962), 26 Ill. 2d 491; *People v. Landry* (1977), 54 Ill. App. 3d 159.) In the case before us the trial court did give an instruction on voluntary manslaughter but refused to give an instruction on involuntary manslaughter. Its reason for refusing the latter instruction

was explicit and, we think, correct. The trial court pointed out that the testimony as to the shooting of Caraher by the defendant indicated that Caraher was lying on the ground when he was shot and there was no evidence he possessed a gun or any means of threatening the defendant when the shooting occurred. The other conduct of the defendant in concert with his two co-defendants, *vis-a-vis* Caraher, such as administering chloroform and abandoning him in a snow bank, was certainly not in the nature of inadvertence, mere recklessness, negligence or accident, but were deliberate acts. There was no evidence that anything done to Caraher by the defendant on the night of the murder was involuntary or unintentional. The gist of the crime of involuntary manslaughter is recklessness. (Ill. Rev. Stat. 1979, ch. 38, par. 9-3.) The conduct of the defendant in this case appears to have been callous and deliberate from beginning to end. The only possibility of recklessness entering into it was in the firing of the gun by the defendant and the evidence indicates that that was done deliberately while the victim was lying on the ground. We agree with the trial court's denial of the requested instruction on involuntary manslaughter since the evidence does not support such an instruction.

Lastly, the defendant complains about the disparity of his sentence of 75 years as compared to that of his co-defendants, who pleaded guilty and received sentences of 30 and 35 years. We see no error in this disparity under the circumstances. The defendant supplied the guns which were the initial force used in subduing the victim as well as participating in the actual kidnapping and abandonment in the snow bank. Wieting, whose bargain with the State was negotiated before the defendant was tried, appears from the testimony to have had little or no previous record, which was not true of the defendant. Johnson, the other co-defendant had, or at least thought

he had, a serious grievance against Caraher who, he believed, had some responsibility for the death of his son. The disparity is thus not unreasonable and we see no evidence based on this difference in sentencing alone that the defendant was being punished for standing on his right to trial.

We granted leave to cite as additional authority in defendant's behalf the recent case of *People v. Gleckler* (1980), 82 Ill. 2d 145. We see no relevance to the case before us. In *Gleckler*, the defendant was convicted of murder along with his two companions. The other two were given prison sentences but Glecker was sentenced to death. On his appeal, Glecker argued that he had acted under compulsion and so was not guilty of murder, therefore he could not be sentenced to death. While rejecting Gleckler's argument that he had acted under compulsion and therefore was not guilty of murder, the court vacated the death sentence and remanded the case for imposition of a sentence other than death. The court in *Glecker* said: "Our revulsion toward this crime and our lack of sympathy for Gleckler cannot justify executing only him." (*Gleckler* at 171.) This indicates that the court would not impose the death penalty on only one of three who were equally guilty of murder, but we do not read it as having any effect on the question whether a person who is found guilty of murder after a full trial should have his sentence reduced to the length of sentence of his companions who pleaded guilty and were not tried. In the recent case of *People v. Walker* (1981), 84 Ill. 2d 512, 528, the distinction was made when Justice Ryan in his concurring opinion said:

> "These cases which I have discussed did not involve the death penalty, and for this reason are not helpful in deciding the case now before this court. The death penalty is such a different penalty that the logic and reasoning of the court in applying

> other penalties are of little help in justifying the imposition of the ultimate penalty."

The evidence indicated a better chance of rehabilitation by one of Frank's accomplices (Wieting) and the other defendant (Johnson) at least had, or thought he had, a serious grievance against the victim. The citing of the *Gleckler* case suggests the argument that because Gleckler's death sentence was reduced to imprisonment, Frank's prison sentence should be reduced to that of his accomplices. Due to the qualitative difference between a death sentence and a prison sentence we do not accept the logic of that argument.

The judgment of the circuit court of McHenry County is affirmed.

JUDGMENT AFFIRMED.

HOPF and NASH, JJ., concur.

APPENDIX B

Order of the Appellate Court Denying Rehearing

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT
ELGIN, ILLINOIS 60120

Aug. 27, 1981

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No. 80-187

People of the State of Illinois, appellee, v. William A. Frank, appellant

Petition by appellant for rehearing denied.

LOREN J. STROTZ
Clerk

Bishop & Kelly
Richard C. Kelly

Theodore J. Floro, S.A.

Phyllis J. Perko

Marshall Stevens

APPENDIX C

Order of the Supreme Court Denying Leave to Appeal

ILLINOIS SUPREME COURT
SPRINGFIELD, ILL. 62706

November 30, 1981

Mr. Richard C. Kelly
Attorney at Law
40 Brink Street
Crystal Lake, IL 60014

No. 55607 — People State of Illinois, respondent, vs. William A. Frank, petitioner. Leave to appeal, Appellate Court, Second District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

CLELL L. WOODS

Clerk of the Supreme Court

Opposition

Supreme Court, U.S.
FILED
APR 1 1982
ALEXANDER L. STEVAS

No. 81-1434

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM A. FRANK,
Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition For A Writ of Certiorari To The Appellate Court of Illinois, Second District

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BRIEF FOR RESPONDENT IN OPPOSITION

TYRONE C. FAHNER
Attorney General,
State of Illinois

MICHAEL B. WEINSTEIN,

ELLEN M. FLAUM,
Assistant Attorneys General
188 West Randolph Street
Chicago, Illinois 60601
Attorneys for Respondent.

Printed by the Authority of the State of Illinois — 3-29-82

QUESTIONS PRESENTED FOR REVIEW

Whether the seizure of gun contained in a case was reasonable where petitioner voluntarily led police to the premises where two guns were located and drew attention to the case containing the gun in question and where police, who had prior information that petitioner carried a gun in the case, were lawfully on the premises with petitioner's consent.

Whether the State's single, unanswered question as to whether the petitioner told police he shot the victim by accident on the night he was arrested, was harmless error beyond a reasonable doubt where there was overwhelming evidence of the petitioner's guilt.

Whether petitioner was prejudiced by the State calling a co-defendant, who had pled guilty, as a witness where co-defendant's name appeared on the list of witnesses and petitioner was afforded an opportunity to interview the witness prior to his testifying and where petitioner did not ask for a continuance but announced he was ready for trial.

Whether the disparity between the sentences of the petitioner and his co-defendants who pled guilty was a denial of due process where the record established that petitioner had a greater participation in the commission of the crime and a lesser potential for rehabilitation and where the trial court expressly disclaimed that petitioner's exercise of his right to trial by jury was a factor in sentencing.

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No. 81-1434

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM A. FRANK,
Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Appellate Court of Illinois, Second District, affirmed petitioner's convictions for aggravated kidnapping and murder. The opinion is reported at 98 Ill. App.3d 388, 424 N.E.2d 799 (2nd Dist. 1981) and is set out in full in the petition for writ of certiorari, Appendix "A." On August 27, 1981, petitioner's petition for a rehearing was denied by Appellate Court of Illinois, Second District and on November 30, 1981, petitioner's petition for leave to appeal was denied by the Supreme Court of Illinois.

JURISDICTION

The jurisdictional requisites have been set forth in the petition for a writ of certiorari, however, as treated more fully within this brief, the respondent submits that the petitioner has not shown any good reason for this Court to exercise its sound judicial discretion to grant his petition.

STATEMENT OF FACTS

Respondent adopts the statement of facts contained in the Illinois Appellate Court opinion and incorporates those facts by reference.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

THE SEIZURE OF THE GUN CONTAINED IN A CASE WAS REASONABLE IN VIEW OF THE FACT THAT PETITIONER VOLUNTARILY LED POLICE TO PREMISES WHERE TWO GUNS WERE LOCATED AND DREW ATTENTION TO THE CASE CONTAINING THE GUN IN QUESTION AND IN VIEW OF THE FACT THAT POLICE, WHO HAD PRIOR INFORMATION THAT PETITIONER CARRIED A GUN IN THE CASE, WERE LAWFULLY ON THE PREMISES WITH PETITIONER'S CONSENT.

The petitioner contends the seizure of a gun and silencer contained in a zippered case was not justified by exigent circumstances or consent. The respondent maintains that under the facts and circumstances the seizure was not unreasonable.

Police, in the instant case, had been informed that the petitioner carried guns in his car and on his person and that one of the guns was kept in a zippered, green case. (Tr. 1/7/80, p. 169). Following petitioner's arrest, he was asked if he had been shooting a gun at the plant which was the scene of the original attack upon the victim. The petitioner replied he had and agreed to show the police the gun, a Luger, which he said was at a tavern. (Tr. 1/7/80, pp. 161-162). The police took the petitioner to get a key to the tavern and subsequently, upon entering the tavern, the petitioner went behind a counter and began moving a green attache case which was in plain view on a shelf underneath the counter. (Tr. 1/7/80, p. 163). According to the officer who was standing next to the petitioner, the petitioner appeared to be shoving the case in the direction of the officer. (Tr. 1/8/80, p. 27). The officer took the case, opened it and found a gun with a silencer inside the case. The petitioner then stated that was not the gun he had reference to and proceeded to another location in the tavern and handed the officer a Luger. (Tr. 1/8/80, p. 33).

The Appellate Court upheld the trial court's denial of the motion to suppress the gun with a silencer. In doing so, the court observed that the petitioner had voluntarily brought the police to the place where he kept the two guns, that the police already knew that the petitioner kept a gun in a green case, and that the police were lawfully on the premises searching for guns with the petitioner's consent. With respect to the examination of the case, the court stated it "... was a reasonable consequence of the defendant's invitation to the police to be present and examine the gun at the tavern premises, inasmuch as the case containing the gun was clearly

visible and no restrictions were indicated by the defendant." *People v. Frank,* 98 Ill. App. 3d 388, 393-4, 424 N.E.2d 799, 803 (2nd. Dist. 1981).

This Court in *United States v. Chadwick,* 433 U.S. 1, 9 (1977) has stated that "[o]ur fundamental inquiry in considering Fourth Amendment issues is whether or not a search and seizure is reasonable under all the circumstances." In the instant case, as distinguished from *Chadwick,* the petitioner had not limited his consent to the search either verbally or by any action indicating a reasonable expectation of privacy. The petitioner voluntarily led police to the premises where both guns were located and drew the police's attention to the very gun in question. Under these circumstances, there was no unreasonable seizure.

II.

THE STATE'S SINGLE, UNANSWERED QUESTION AS TO WHETHER THE PETITIONER TOLD POLICE HE SHOT THE VICTIM BY ACCIDENT ON THE NIGHT HE WAS ARRESTED, WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT WHERE THERE WAS OVERWHELMING EVIDENCE OF THE PETITIONER'S GUILT.

The petitioner contends that he was prejudiced by a single question asked, but not answered, regarding a statement made to the police the night he was arrested which had been suppressed. The respondent maintains that the one improper question was harmless error.

The petitioner filed a Motion to Suppress Confession which was allowed and obtained a pretrial ruling granting a motion

in limine to preclude reference to statements made by the defendant at the time of his arrest. After petitioner had testified that his shooting of the victim was not intentional (Tr. 1/23/80, p. 882), the prosecutor, on cross-examination, asked, "The night you were arrested did you tell the police you shot him by accident?" (Tr. 1/23/80, p. 895). Defense counsel immediately objected to the question and it was not answered. The trial court sustained the objection and instructed the jury to disregard the line of questioning. (Tr. 1/23/80, pp. 895-897, 899). The trial court also denied the petitioner's motion for a mistrial stating it did not consider the prejudice to the defendant sufficient to warrant a mistrial and observing that the question was never answered. (Tr. 1/23/80, pp. 897-898).

The prosecutor's question does not constitute a violation under *Doyle v. Ohio,* 426 U.S. 610 (1976) as it was not an inquiry into or reference to the petitioner's silence after arrest. Assuming arguendo, however, that the single, unanswered question could be regarded as a *Doyle* violation, the error was harmless. *Chapman v. United States,* 547 F.2d 1240 (5th Cir. 1977), *cert. denied,* 431 U.S. 908 (1977). In *Chapman,* an arresting officer testified that the defendant did not say anything after he was arrested. The court, however, held that evidence of the defendant's guilt was so strong that a single reference to his silence was harmless beyond a reasonable doubt. 547 F.2d at 1249.

In the instant case, only one question was asked and it was not answered. The objection to the question was sustained and the trial court instructed the jury to disregard the question and that line of questioning was not pursued. The Appellate Court, therefore, properly held that whether the question was regarded as a violation of *Doyle* or a violation of the order *in limine,* the error was harmless.

Petitioner offers no evidence to show that he was in any way

prejudiced by the question. In addition to the petitioner's own testimony regarding his involvement in the events, and that of his accomplice, Weiting, there was evidence introduced indicating that the petitioner battered in the teeth of the victim to preclude his identification from dental records (Tr. 1/18/80, pp. 295, 430); that he drilled out the barrel of the Lugar to preclude ballistics testing (Tr. 1/18/80, p. 429); and that he kept a knife belonging to the victim (Tr. 1/18/80, pp. 435-437). In view of the overwhelming evidence of the petitioner's guilt, the one unanswered question was clearly harmless error beyond a reasonable doubt.

III.

PETITIONER WAS NOT PREJUDICED BY THE STATE CALLING A CO-DEFENDANT, WHO HAD PLED GUILTY, AS A WITNESS WHERE CO-DEFENDANT'S NAME APPEARED ON THE LIST OF WITNESSES, AND PETITIONER WAS AFFORDED AN OPPORTUNITY TO INTERVIEW THE WITNESS PRIOR TO HIS TESTIFYING AND WHERE PETITIONER DID NOT ASK FOR A CONTINUANCE BUT ANNOUNCED HE WAS READY FOR TRIAL.

The petitioner argues that he was denied due process when the State allegedly failed to notify him of its intent to call a co-defendant as a witness. The respondent submits that petitioner was not denied due process where he was given notice that the co-defendant would be a witness; was afforded an opportunity to interview the witness before he testified; and did not request a continuance or recess based on surprise or the need to reorganize his defense.

The record establishes that on January 14, 1980 the petitioner's motion to sever his cause from those of his co-defendants was granted and that two days later, on January 16, co-defendant Weiting pled guilty. The next day, January 17, 1980, petitioner's trial began and prior to jury selection, the trial court read in open court a list of witnesses which included co-defendant's name. (Tr. 1/17/80, p. 34).

On January 22, 1980, the State obtained a writ for the appearance of Weiting to testify. (Tr. 1/23/80 p. 802). On January 23, 1980, the day the witness was to testify, defense counsel informed the trial court that he first learned from the State that Weiting was to testify at 3 p.m. the preceding day and that representations had been previously made to him by Weiting's attorneys that Weiting would not be called to testify. (Tr. 1/23/80, pp. 792, 795).

The trial court pointed out to defense counsel that Weiting's name had been on the list of witnesses read to the jury. (Tr. 1/23/80, p. 806). The court also conducted an examination of Weiting during which the witness stated that he wished to testify, that he was not forced to do so, and that there was no prior agreement with the State not to testify. (Tr. 1/23/80, pp. 823,824). The witness was then given an opportunity to speak to his lawyers and he subsequently reiterated that he wished to testify. (Tr. 1/23/80, pp. 824-825).

The trial court had previously stated that it would give petitioner's counsel an opportunity to speak with Weiting prior to his testifying (Tr. 1/23/80, p. 807) and the court repeated this offer after Weiting stated he wished to testify. (Tr. 1/23/80, p. 825). Counsel stated that he had already talked to Weiting and, in response to the court's inquiry as to whether the defense was ready to proceed, counsel answered affirmatively. (Tr. 1/23/80, pp. 825-826).

As the Appellate Court observed, the assurances of Weiting's attorneys that Weiting would not testify were not binding on the State; petitioner's counsel was afforded an opportunity to interview the witness before he testified which he did; and counsel did not ask for a continuance based on surprise or for time to reorganize his defense, but announced he was ready for trial. *People v. Frank,* 98 Ill. App. 3d 388, 395, 424 N.E.2d 799, 804 (2nd Dist. 1981).

The facts do not indicate that the State withheld its intention to call the co-defendants as a witness. Furthermore, the petitioner has offered no evidence as to how he was in any way prejudiced by the events. Indeed, petitioner's failure to request a continuance of a recess prior to the witness's testifying is persuasive evidence that any alleged prejudice is trivial. *(People v. Foster,* 76 Ill. 2d 365, 392 N.E.2d 6 (1979).

IV.

THE DISPARITY BETWEEN THE SENTENCES OF THE PETITIONER AND HIS CO-DEFENDANTS WHO PLED GUILTY WAS NOT A DENIAL OF DUE PROCESS WHERE THE RECORD ESTABLISHED THAT PETITIONER HAD A GREATER PARTICIPATION IN THE COMMISSION OF THE CRIME AND A LESSER POTENTIAL FOR REHABILITATION AND WHERE TRIAL COURT EXPRESSLY DISCLAIMED THAT PETITIONER'S EXERCISE OF HIS RIGHT TO TRIAL BY JURY WAS A FACTOR IN SENTENCING.

The petitioner contends that the disparity between his sentence and those of his co-defendants, who he alleges were

equal participants in the offense, constitutes a denial of due process and an attempt to penalize him for exercising his right to trial by jury. The respondent submits that the facts provide an ample basis for distinguishing the petitioner's greater involvement and cupability and support the imposition of a greater penalty than that given to the co-defendants who pled guilty. Further, the record provides no support for the inference that the trial court's motive in imposing a higher sentence was improper.

At the sentencing hearing, the trial court expressly rejected the idea that the petitioner's exercise of his right to trial by jury was or would be a factor in his sentencing. The trial court stated:

> This Court wishes to make it absolutely clear that it recognizes and applies and feels very strongly about the fact that no defendant should be punished in any manner, way or form, for exercising his Constitutional privilege of requiring the State to prove him guilty beyond a reasonable doubt. There should never be a greater penalty for the imposition of that. (Tr. 2/28/80, p. 182).

The trial court then addressed the issue of the petitioner's greater culpability in the offense noting specifically that the petitioner supplied the weapons used in the crime; supplied the handcuffs used to restrain the victim; and inflicted the facial injuries to the victim. (Tr. 2/28/80, pp. 185-186). The court then observed that the petitioner evidenced a disregard or disrespect for the law characterized by his admission that he knowingly made an illegal silencer and by the fact that a short time after the murder was committed the petitioner was charged with unlawful use of weapons for carrying and discharging a gun in a populated area. (Tr. 2/28/80, pp. 186-187). The trial court also stated that there was no evidence that the victim had exhibited any aggressive

behavior toward the petitioner or provoked him in any manner which could justify the petitioner's actions. The Appellate Court observed, by way of contrast, that the evidence indicated one of the co-defendants, Weiting, had a better chance of rehabilitation and the other, Johnson, had or thought he had a serious grievance against the victim who he believed had some responsibility for the death of his son, *People v. Frank,* 98 Ill. App. 3d 388, 397-8, 424 N.E.2d 799, 805-6 (2nd Dist. 1981).

Under Illinois law, a judge may sentence an offender to an extended term for murder upon a finding that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. *Ill. Rev. Stat.* 1979, ch. 38, par. 1005-8-2(a)(1), par. 1005-5-3.2(a)(2). The victim in the instant case had been shot in both legs; one wound had been lacerated and some tissue removed by a sharp instrument. The victim had also been bound at the wrists, chloroformed, beaten about the face and driven around suffering from his wounds for several hours before being buried in the snow. By the petitioner's own testimony, he fired twice at the ground near the victim's legs and realized he shot him. (Tr. 1/23/80, pp. 882-883). Additionally, the trial court stated it was convinced by the record that the petitioner "participated at least in the carving of the victim's leg and specifically and individually smashed the handcuffed, wounded chloroformed person's face in at a time when the record shows he was alive." (Tr. 2/28/80. p. 192). The trial court, therefore, applied the extended term provision in sentencing the petitioner.

The co-defendants' sentences in the instant case were attributable to agreements made with the State pursuant to their pleas of guilty and, therefore, do not provide a valid basis for comparison. *People v. Bennett,* 90 Ill. App. 3d 64, 412 N.E.2d 1001 (5th Dist. 1980). Moreover, as the Appellate Court noted, there was evidence that the co-defendants either had a

greater likelihood of rehabilitation or a serious grievance against the victim. Thus, the disparity in sentencing was not unreasonable in the Appellate Court's view.

The petitioner's sentence is justified by reason of his greater participation in the crime, his lesser potential for rehabilitation, and his deliberate, wanton acts of cruelty in inflicting additional injuries to the unconscious victim.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

TYRONE C. FAHNER,
Attorney General,
State of Illinois,

MICHAEL B. WEINSTEIN,

ELLEN M. FLAUM,*
Assistant Attorneys General,
188 West Randolph Street,
Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,

Attorneys for Respondent.

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* Christ Stacey, senior law student at The John Marshall Law School, assisted in the research and preparation of this Brief.